No. 84-1313

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

DANTE CARLO CIRAOLO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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(9)

i.

QUESTIONS PRESENTED

1. Whether police who conduct a focused aerial search of respondent's enclosed, urban backyard without warrant violate the Fourth Amendment.

2. Whether the State may rely on United States v. Leon to excuse the illegal police conduct which resulted in the gathering of the information upon which a search warrant affidavit was based.

3. Whether the Leon issue (No. 2, above) should be considered in this Court even though it was not raised in the trial court and thus there is no record on the "good faith" vel non of the search warrant affiant.

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No. 84-1513

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Respondent respectfully submits the Petition should be denied for the reasons stated below.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 161 Cal.App.2d 1081, 208 Cal.Rptr. 93.

JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent's 1983 conviction for marijuana cultivation arose out of a negotiated guilty plea following an unsuccessful motion to suppress all evidence obtained as the fruits of what respondent believed was an unconstitutional aerial search of his enclosed urban residential curtilage. A charge of selling a quarter ounce of marijuana was dismissed as part of the plea bargain. Under California law, this issue is preserved for appeal despite the guilty plea.

Relying on Oliver v. United States (1984) 466 U.S. ___, 80 L.Ed.2d 214, Wong Sun v. United States (1963) 371 U.S. 471 and Segura v. United States (1984) ___ U.S. ___, 82 L.Ed.2d 599, among other Supreme Court authority, the California Court of Appeal found that the case at bar involved a "direct and unauthorized intrusion into the sanctity of the home," and reversed respondent's conviction. (Petition, Appendix A (hereafter "P-A") p. 19.

The State's petitions for rehearing in the Court of Appeal and hearing in the California Supreme Court were denied.

STATEMENT OF FACTS

An anonymous phone message reading, "[C]an see grass growing in yard, Stebbins by Clark, S/B on left" was received by Santa Clara City Police narcotics officer John Shutz (hereafter Shutz) on September 2, 1982. (CT 11, 36, 37).[1] Responding to this message, Shutz went to the area, located in a residential tract among the streets of the City of Santa Clara. (CT 14). Having chosen as a suspect home the particular house located at 2085 Clark Avenue, Shutz investigated on foot the residence of respondent Dante Carlo Ciraolo, who lives there with his family. (CT 15; 37-38, 99). Officer Shutz was unable to see any marijuana from his ground-level view. (CT 38). He could see only another fence within the home's backyard. (CT 15, 38, 43). The inner area was enclosed by a fifteen-foot wide standard fence about six feet tall, which is attached to the house. (CT 38). Its height was elevated an additional few feet by bamboo stakes in the inner area. (CT 38, 44). In all, the inner fence line was approximately ten feet high. (CT 15, 44). The inner yard contained a swimming pool where the family expected privacy.[2] Later that day, Shutz chartered an airplane for the specific purpose of observing and photographing respondent's residence and its adjacent fenced yard. (CT 11-12, 38).

According to Shutz, the aerial surveillance and photography of Ciraolo's home and yard were conducted at an altitute of at least 1,000 feet. (CT 12-13, 38). From the air, no visual aids were used. (CT 12). However, Shutz stated that from that distance, he was able to see "a green colored residence with surrounding fenced property" within which was an interior fenced yard measuring approximately 15 x 25 feet. (CT 38:11-17). He said he could see full marijuana plants about 8-10 feet tall growing inside the interior fenced area. (CT 40, 14:13-22; 38:11-19). Shutz observed Ciraolo's house, his side yard and backyard. (CT 14-15).[3]

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[1] "CT" refers to the Clerk's Transcript on Appeal.

[2] Testimony regarding the family's use of the pool was erroneously excluded by the trial court. (RT 4-12). ["RT" refers to the Reporter's Transcript of the suppression hearing of August 15, 1983.] Ciraolo complained of this exclusion on appeal.

[3] Petitioner's notation that other aircraft were in the area using the San Jose Airport is misleading. (Petition, 6). The State never argued that respondent had a diminished expectation of backyard privacy for this reason. In any event, it was not established that such aircraft contained persons who could or did peer into respondent's backyard.

After the aerial search, Shutz sought a search warrant for the Ciraolo residence, alleging the belief that it contained marijuana and related items of contraband based on his experience, his observations and conclusions regarding the Ciraolo property, and the conclusions of Narcotics Task Force Agent R. Rodriguez, who had accompanied Shutz on his aerial mission. (CT 36-40). The requested warrant issued, and its execution yielded marijuana growing within the inner fence of the Ciraolo backyard. (CT 6, 34-35).

At the hearing on Ciraolo's suppression motion, the prosecution maintained simply that the directed aerial surveillance was lawful because it was conducted 1,000 feet over the residence without the use of binoculars. (CT 43-48; RT 11).[4] Respondent's motion to suppress the evidence against him was denied without opinion. (CT 72, 81). The California Court of Appeal reversed, finding that by any standard, Ciraolo had a reasonable expectation of privacy in the curtilage of his home and that the police conduct in issue was an unreasonable violation of that privacy, requiring suppression under the Fourth Amendment.[5]

REASONS FOR DENYING THE WRIT

Summary of Argument

The California Court of Appeal correctly ruled that the particular aerial observation in the case at bar was a violation of respondent's Fourth Amendment protection against unreasonable

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[4] There was no suggestion in the trial court that a good faith exception should be made so that the evidence gathered illegally could be used to support a search warrant. This argument was raised by the California Court of Appeal on its own motion and briefed in that court at the invitation of the Court. P-A 4.

[5] Since no warrant was sought to make the aerial search of the curtilage, the court below had no occasion to decide whether there was probable cause for that search.

governmental intrusions upon his right to residential privacy. This decision is consistent with the recent decisions of this Court and should only be reviewed if this Court may wish to rule that under no circumstances do persons here have a right to privacy against aerial spying into their homes.

Relying on long-established principles of law protecting the curtilage from warrantless visual intrusions, the court below properly applied the exclusionary rule to the fruits of illegal police conduct. It is undisputed that the instant matter involved the particularized, deliberate, aerial circumvention of an otherwise enclosed, visually impermeable area intimately associated with Ciraolo's home, based on nothing more than a nonspecific anonymous tip.

Consequently, the California Court of Appeal opinion in no way conflicts with other cases holding that open areas were lawfully viewed or with cases holding that evidence obtained by plain view without attempting to invade privacy is not subject to the exclusionary rule.

Petitioner's attempt to equate illegally obtained probable cause with a dispute over the sufficiency of probable cause as involved in Leon[5a] must also fail. If there were no penalty for illegally obtaining the very facts relied upon to procure a warrant, there would be, contrary to Leon, no sanction for violations of the Fourth Amendment. Moreover, petitioner failed to properly raise or preserve the issue of good faith reliance on the magistrate's probable cause determination, thus preventing a factual hearing and waiving its right to raise it now.

[5a] United States v. Leon (1984) 468 U.S. ___, 82 L.Ed.2d 677.

ARGUMENT

1. This Court Both Historically And Very Recently Has Treated The Curtilage Of A Home With The Same Protection As The Interior Of The Home For Fourth Amendment Purposes.

The Attorney General of California seeks to have this Court reexamine what was just decided in Oliver v. United States (1984) 466 U.S. ___, 80 L.Ed.2d 214, namely that when it comes to Fourth Amendment protection of privacy and security the curtilage of one's home has the same protection as its interior. This Court stated in Oliver:

> . . . An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. [80 L.Ed.2d at 224.]
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> The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home . . . . The curtilage . . . has been considered part of home itself for Fourth Amendment purposes. [80 L.Ed.2d at 225.]

Although there were concurring and dissenting opinions in Oliver, they do not take issue with creating no distinction between the interior of the home and the curtilage when it comes to Fourth Amendment protections. Thus the Court is now unanimous in this view.

The equivalency of the curtilage with the home is not a fragile new development subject to re-examination when viewed in a fresh light, but historically well-established in Blackstone.[6] Hester v. United States (1924) 265 U.S. 57, Air Pollution Variance Bd. v. Western Alfalfa Corp. (1974) 416 U.S. 861, 865; and see United States v. Van Dyke, 643 F.2d 992, 993-994 (C.A.4 1981), United States v. Williams, 581 F.2d 451, 453 (C.A.5 1978), Care v. United States, 231 F.2d 22, 25 (C.A.10).

[6] See 4 Blackstone, Commentaries, *225.

The Petition now before the Court gives little reason for re-examining this established doctrine except that the Attorney General of California does not wish to comply with the current and historical demands of the United States Constitution in carrying out law enforcement tasks. There is no question in this case that, however narrowly or broadly the term "curtilage" might be defined, the contraband in this case was next to respondent's home and within the curtilage.

The really significant question which the Petition raises only obscurely is why should aerial surveillance be treated differently than patrol car surveillance by the police from the ground level? If we assume that the police on strongly-founded information have probable cause to believe that illegal marijuana is growing in the curtilage of a home, why should there be a distinction between a viewing of that marijuana from a patrol car on a public street (a "plain view") and a viewing of that same marijuana from the air when it was protected from "plain view" from the street by a high fence? Whether such a distinction has merit is the subject of the next section of this response.

2. The Fourth Amendment Provides Protection Against Aerial Invasions Of The Home And Curtilage From Purposeful Invasion.

This case involves a warrantless focused scrutiny on defendant's home from the air. It does not involve aerial observations by happenstance or through routine patrol. This case is thus the broadest-gauge attack possible on the Warrant Requirement for one's effects which are not under an opaque roof or out

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of sight of the home's windows or skylights.[7] The petitioner would treat aerial spying on a home in the same manner as spying on a home from a public street.

But the airspace above one's home is not a public street. It is more analogous to the territorial seas where the right of innocent passage is allowed but when the purpose of the passage is to invade the sovereign interests of the territorial state, the passage is no longer "innocent" under international law. If the expectation of privacy which our citizens reasonably have for their homes and yards is to be invaded from the air by reason of a focused suspicion of crime, that invasion must be authorized by a magistrate to comply with the Fourth Amendment.

It is apparent that the kind of carte blanche sought by the government in this Petition is neither necessary to effective law enforcement nor compatible with a healthy society. If our citizens can obtain privacy within the curtilage only by constructing both a fence opaque to horizontal viewing and a roof opaque to vertical viewing then the price of the Fourth Amendment protections so long fought for by our people prior to the adoption of the Bill of Rights and so long protected by this Court will be a deprivation of sunlight, an unacceptable price in pure human terms.

If the petitioner's position is accepted and there is no protection from focused scrutiny by aerial surveillance of any effects within the home or curtilage which could possibly be seen from the air, then it is hard to find any basis for denying the

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[7] True, petitioner does seek to concede that some kind of protection should apply for police flying outside of navigable airspace or "in a physically non intrusive manner" (Petition, pp. 18-19), but these are vague definitions not addressed by the court below. In any event, what is "physically non intrusive" should be decided by a magistrate in advance of any intrusion by placing conditions on the execution of a warrant allowing for aerial surveillance.

overseers the right to high-powered gyroscopic binoculars and advanced optics photography to allow a detailed and leisurely scrutiny of whatever comes into view from the air.[8] There are many answers to a parade of horribles but the argument seems justified in the context of this case.

The warrant requirement is a simple and effective means to prevent the parade of horribles from getting out of control as a magistrate could limit the kind and intensity of aerial surveillance undertaken on probable cause. Backyard privacy could be protected by the magistrate where practicable. This is certainly a more effective method of controlling abuses of aerial surveillance than the injunction remedy pursuant to a 42 U.S.C. § 1983 action such as was required to control gross abuses of privacy by helicopters allegedly searching for marijuana described by the District Court in NORML v, Mullen, ___ F.Supp. ___ (No. 83-4037 RPA, N.D.Ca. 1985).

Citing a District Court opinion in United States v. Bassford, ___ F.Supp. ___ (D. Maine 1985) the petitioner asserts that distinguishing between curtilage areas and non curtilage areas from the air is impracticable (Petition, p. 15) and does not provide "meaningful guidance to police" (Petition, p. 16). How strange it is that the petitioner overlooks footnote 12 in Oliver v. United States, supra, which deals with this issue swiftly and decisively:

> The clarity of the open fields doctrine that we reaffirm today is not sacrificed, as the dissent suggests, by our recognition that the curtilage remains within the protections of the Fourth Amendment. Most of the many millions of acres that are "open fields" are not close to any structure and so not arguably within the

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[8] See Dow Chemical Co. v. United States (6th Cir. 1984) 749 F.2d 307, Petition For Cert. pending, No. 84-1259.

> curtilage. And for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage--as the area around the home to which the activity of home life extends--is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment advocated by the dissent. [80 L.Ed.2d at 226.]

Lastly, petitioner argues that the intrusion from aerial surveillance into one's home and curtilage is hardly noticeable and hardly worth the attention of the Fourth Amendment. Even if our case does involve the "obnoxious thing in its most palatable form", this Court has recently considered and rejected the excuse that it is only a little Fourth Amendment violation in United States v. Karo (1984) 468 U.S. ____, 82 L.Ed.2d 530. In that case the warrantless monitoring of a surveillance device that was brought into a home was found to be a transmittal of information about what was in that home and therefore to be a violation of the Fourth Amendment subject to the exclusionary rule. The court below ruled in a parallel manner that the warrantless obtaining of information by a focused invasion of the curtilage could not be used as the sole basis for a search warrant. This Court pointed out in Karo that the government could not have made a warrantless entry into the defendant's home to verify the presence of the chemical being monitored in that home and then use that information to obtain a search warrant. Therefore, the electronic monitoring was also a Fourth Amendment violation. In our case the government cannot jump the fence and enter respondent's curtilage for the purpose of obtaining a view of the marijuana garden and then use that view as the basis for its search warrant affidavit. As the District Court wrote in NORML v. Mullen, supra, "just as a [government] agent on

the ground cannot on a whim climb a fence to peer into a house otherwise protected from his view, a [government] helicopter cannot randomly position itself over a home to leisurely contemplate the scene below."

3. This Is Not The Case To Decide Whether United States v. Leon Applies To Warrantless Searches Because A Record On The "Good Faith" Of The Officer In Making The Warrantless Search Was Not Made Below.

Certainly, and perhaps soon, this Court will decide the issue of whether the exclusionary rule should apply when a policeman in objectively reasonable good faith believed that he had the right to make a warrantless search but it is later determined that he had no such right. To decide this question the issue (1) should have been raised in the fact-gathering court and (2) should be decided on testimony establishing the objective good faith of the officer who inadvertently violates the Fourth Amendment. In our case, neither condition is present.

The good faith issue was raised for the first time by the California Court of Appeal on its own motion. See P-A, p. 4. As in Illinois v. Gates (1983) 462 U.S. 213, and for the reasons stated there at length, there is at least a prudential, if not a jurisdictional, objection to considering points from state courts not properly raised below. If these impediments to certiorari review are not availing then we would add that (3) the airborne police should have known that under California law the legality of their surreptitous surveillance was, at the least, an open issue, and (4) this Court's recent Segura decision condemns the "indirect products of unconstitutional conduct" without regard to the good faith of the searching officer.

The fact is, as stated above, the law in this country has long protected the curtilage and the home from warrantless invasions of privacy and security and few, if any, cases hold

that there is no Fourth Amendment protection from aerial surveillance. Whether the officer who flew over respondent's home to verify the information given him before he applied for a search warrant knew that the curtilage was protected by the Fourth Amendment is the subject of factual investigation not yet undertaken. Moreover, the entire issue of aerial surveillance to obtain information of criminal violations is still being litigated under California law and the California Supreme Court now has two cases involving this issue before it which were argued in September of 1984 and remain undecided. People v. Mayoff, Crim. No. 23608 and People v. Cook, Crim. No. 23651.

Petitioner is faced with still another problem in seeking review in that only last Term this Court decided Segura v. United States (1984) ___ U.S. ___, 82 L.Ed.2d 599. That case, as discussed in the California Court of Appeal, reaffirmed the "fruit of the poisonous tree" doctrine which was applied in its full vigor in Wong Sun v. United States (1963) 371 U.S. 471, a case cited with approval in Segura, supra. To extend the United States v. Leon decision to authorize illegal warrantless searches as the basis for search warrant applications would directly destroy the Wong Sun doctrine and conflict with Segura. Moreover, it would encourage illegal warrantless searches rather than encouraging warranted searches which is at the heart of this Court's reasoning in Illinois v. Gates, supra, and United States v. Leon, supra.

If the petitioner is correct in his argument that the "good faith exception" should apply both to warranted and warrantless searches so that a warrant would be valid so long as issued by a magistrate, whether or not the information obtained for the affidavit was legally obtained, then there would be no point in obeying the Fourth Amendment. Certainly the magistrate

viewing the affidavit in an ex parte setting without hearing or argument is in no position to rule on the legality of the police actions. Nor would the magistrate ordinarily make such a ruling on the affidavit alone. The decision on legality vel non is to be made in an adversary setting after the warrant has been executed.

CONCLUSION

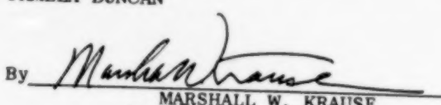
This is not an appropriate case to measure the scope of Fourth Amendment rights in the context of airplane overflights. Its facts are the least appealing of the uses of airplane overflights because the spying was intentional and focused on petitioner and thus called for the neutral intervention of a magistrate's judgment. The issue of "good faith" was not properly raised or tried below and the exception claimed is so broad that it would eliminate any effective remedy for Fourth Amendment violations.

For these reasons, the Petition should be denied.

May 10, 1985

Respectfully submitted,

MARSHALL W. KRAUSE,
KRAUSE, BASKIN, SHELL, GRANT & BALLENTINE
PAMELA DUNCAN

By 
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PROOF OF SERVICE

MARSHALL W. KRAUSE, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 207 Wood Island, 60 E. Sir Francis Drake Blvd., Larkspur, California 94939; that on May 10, 1985 true copies of the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF AND RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT in the above-entitled matter were served on counsel of record by placing same in an envelope addressed as follows:

Clerk, United States Supreme Court
1 First Street N.E.
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Said envelopes were then sealed and deposited in the United States Mail at Larkspur, California with first class postage thereon fully prepaid.

MARSHALL W. KRAUSE
Counsel for Respondent

Dated: May 10, 1985

Subscribed and Sworn to Before Me
this 10th day of May, 1985.

NOTARY PUBLIC

SALLY MOSES U.S. Notary Pub. C
My Comm. Exp. June 30, 1985
County of Marin Calif.